

The respondent argues there is only evidence claimant was attacked by an unknown assailant. Accordingly, respondent argues the analysis of this case should be based on an assault by a third party and there is no evidence claimant's employment placed him at an increased risk. Respondent further notes that the former employee and

claimant had last worked together 13 months before the attack and no mention was made about their prior disagreement on the night of the attack. Respondent concludes the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein and the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a janitorial crew member for respondent and was assigned to a Dillons store in Andover, Kansas. His job duties included cleaning, scrubbing and buffing. Claimant arrived at work at 9 p.m. on November 30, 2002, and he started the first sweep of the store.

At approximately 9:40 p.m., he was approached by Clint Peter, a former co-employee, and another individual. Mr. Peter attempted to get claimant to go outside and fight him. Claimant refused and as he started to walk away he was grabbed by the unidentified man and thrown to the floor. Claimant was rendered unconscious and the next thing he remembered was waking up bloodied on the floor. Claimant agreed that the only person that he knew had attacked him was the unidentified man.

Claimant and Mr. Peter had worked together on the same crew for approximately three weeks in 2001, and then Mr. Peter had been transferred to the first shift on October 2, 2001. Because of the loss of first shift work, Mr. Peter was terminated on March 16, 2002.

Claimant testified that although he was younger than Mr. Peter, he had more seniority and as a result got work assignments running cleaning machines while Mr. Peter would be assigned the less desirable jobs such as cleaning bathrooms. As a result claimant felt Mr. Peter was jealous of claimant's relationship with his supervisor.

But claimant noted that his relationship with Mr. Peter was friendly until one night when claimant teased Mr. Peter about his relationship with an assistant supervisor and the two had an argument. The claimant described the argument in the following manner:

Q. Mr. Wine, there has been a lot of talk about this argument that you and Clint Peter had sometime more than a year before this accident; describe that argument.

A. Like what we said or --

Q. Right.

A. I'm not sure what Adam had said to him. He was already mad or something, Adam had said something to him, and him and Janice, my assistant supervisor, they

were pretty close and me and Adam were pretty close, working anyways, and I was joking around with him, I said he looked mad and I was just kind of joking around with him. I said, what's wrong, your girlfriend's not here, and he kind of got upset and he started just like saying stuff to me like, you know, like cussing me out and saying, you know, we can do this fight or whatever, and I was pretty much cussing back at him, and that's when we decided -- I mean I said, I'm not going to fight you at work, and he said, I'm not going to fight you at work either, so we'll just stay strictly work, and he said, okay, and I said, okay, and then we didn't talk since that time.

Q. So that argument was essentially about something you said about his girlfriend?

A. No, no, it was my assistant supervisor, I was joking around with him about her being his girlfriend, you know.

Q. So that didn't have anything to do with the work that you were doing, did it?

A. Just that we -- that him and Janice were close and me and Adam were close, you know, I was kind of joking around about that, because she was off that night.<sup>1</sup>

Claimant testified that he had no further conversations or contact with Mr. Peter until the incident on November 30, 2002. Claimant further agreed that as far as he knew there was no animosity between he and Mr. Peter.

Claimant agreed that on November 30, 2002, Mr. Peter never stated why he wanted to fight. Mr. Peter just started telling claimant "talk stuff to me now" and that he wanted claimant to come outside to settle things. Claimant speculated the reason Mr. Peter wanted to fight was because of the one argument at work.

On appeal, the threshold question is whether, under the facts and circumstances of this case, the injuries sustained by the claimant at work from an assault by a former co-worker and his accomplice are compensable. Fights between co-workers usually do not arise out of employment and generally will not be compensable.<sup>2</sup> If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.<sup>3</sup> For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were

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<sup>1</sup> P.H. Trans. at 28-29.

<sup>2</sup> *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

<sup>3</sup> See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

exacerbated by an employment hazard,<sup>4</sup> or the employer had reason to anticipate that injury would result if the co-workers continued to work together.<sup>5</sup>

The Board finds, as did the ALJ, that claimant was injured when a former co-worker and his accomplice assaulted claimant over a personal matter that had no relationship to the work. The teasing that led to the only disagreement between claimant and Mr. Peter was not related to the conditions and incidents of employment but instead was a personal dispute. The former co-worker had not worked with claimant for over a year and there is no evidence respondent could have anticipated the assault. Finally, all of claimant's injuries were caused by the assault and were not exacerbated by any particular employment hazard.

### **AWARD**

**WHEREFORE**, it is the finding, of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 10, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this 30th day of May 2003.

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BOARD MEMBER

c: Christopher Randall, Attorney for Claimant  
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>4</sup> *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

<sup>5</sup> *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).